Notes

ACT OF STATE — Cuban Expropriations — Executive Suggestion — *Bernstein* Exception Applied to Restrict Role of Act of State Doctrine — *First National City Bank v. Banco Nacional de Cuba*, 92 S.Ct. 1808 (1972).

In July 1959, six months before the Castro government came to power in Cuba, First National City Bank (Citibank) loaned $15 million to a predecessor of Banco Nacional de Cuba (Banco Nacional), against a like amount of collateral.[1] The loan was renewed the following year and, when $5 million of the debt was repaid in 1960, a corresponding portion of the collateral was released. On September 16, 1960, Citibank's branches in Cuba were seized by the Cuban government.[2] Citibank immediately sold the collateral securing the remaining $10 million of the loan, but realized an excess over principal and interest of about $1.8 million. Banco Nacional brought suit in Federal District Court in 1961 to collect this amount and Citibank counterclaimed for damages resulting from the uncompensated expropriations. Citibank's motion for summary judgment was granted[3] after stipulations that no recovery would be sought in excess of Banco Nacional's claim and that the value of Citibank's property exceeded that claim.

The Court of Appeals reversed,[4] holding that the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*[5] would bar Citibank's

1. The loan was made to Banco Desarrollo Economico y Social. By virtue of Cuban Law No. 730, Feb. 16, 1960 and Cuban Law No. 847, June 30, 1960, Banco Desarrollo was dissolved, and Banco Nacional succeeded to the rights and obligations involved in this suit. *See Banco Nacional de Cuba v. First National City Bank*, 270 F. Supp. 1004, 1005 (S.D.N.Y. 1967).

2. Nationalization was part of the series of events touched off by the U.S. reduction of the quota of Cuban sugar in July, 1960. The Cuban government enacted Cuban Law No. 851 (the Nationalization Law) just after the quota reduction and on September 16, 1960 all of Citibank's eleven branches in Cuba were seized. On the following day, Executive Power Resolution No. 2 gave the government power to nationalize American banks.

3. 270 F. Supp. 1004 (S.D.N.Y. 1967).

4. 431 F.2d 394 (2d Cir. 1970).

5. 376 U.S. 398 (1964). For two excellent analyses of the opinion, *see* R. FALK, THE AFTERMATH OF SABBATINO: BACKGROUND PAPERS AND PROCEEDINGS OF THE SEVENTH HAMMARSKJÖLD FORUM (1965) (hereinafter FALK), and R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT (1965), particularly chapter II (hereinafter LILLICH).

counterclaim and that the Congressional amendment to the Foreign Assistance Act of 1964 (the so-called Sabbatino Amendment[6]) was inapplicable. The Supreme Court vacated this judgment without expressing any opinion on the merits, and remanded to the Court of Appeals[7] to consider a letter newly filed by the Department of State[8] suggesting that the act of state doctrine should not bar judicial examination of Cuban expropriations. The Court of Appeals reaffirmed its prior decision.[9] On appeal a second time, with Justice Rehnquist speaking for himself, the Chief Justice and Justice White, Justices Douglas and Powell concurring in separate opinions, the Supreme Court reversed and remanded to the appeals court once more.[10] The three opinions comprising the majority agreed only that judicial consideration of Citibank's counterclaim was not barred by the act of state doctrine.

This Note will *first* analyze briefly the act of state doctrine and the foundation on which it rests, *second* consider this most recent Supreme Court decision in light of this analysis, and *finally* explore the possible ramifications of the decision.

BASES OF THE DOCTRINE

In the 1964 case *Banco Nacional de Cuba v. Sabbatino*, Mr. Justice Harlan, speaking for the majority, presented the most recent American judicial refinement of the act of state doctrine:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[11]

Three principal reasons for the doctrine, as formulated and applied by United States courts, stand out: (1) respect for the sovereign's right

6. 22 U.S.C. § 2370(e)(2) (1970), *amending* 78 Stat. 1013 (1964). For discussion of the reasoning behind the court's rejection of the Amendment in this case, *see* text accompanying notes 16–21, *infra*.

7. 400 U.S. 1019 (1971).

8. Letter from John R. Stevenson, Legal Adviser to the Department of State, to the Clerk of the United States Supreme Court (hereinafter Stevenson Letter). The text of the Letter is reprinted as an appendix to the Second Circuit's opinion on remand, 442 F.2d 530, 536 (2d Cir. 1971). For a discussion of the Letter, *see* note 30, *infra*.

9. 442 F.2d 530 (2d Cir. 1971). *See* Note, 12 HARV. INT'L L.J. 557 (1971).

10. 92 S.Ct. 1808 (1972).

11. 376 U.S. at 428. The term "recognized" as used in the above quotation should not be confused with the existence of formal diplomatic relations. "Recognized" indicates only that the United States acknowledges that the particular government in question is also the government in power.

of self-government within its own territory, (2) concern that title to property in international commerce would be rendered less stable by judicial interference in this area, and (3) concern with judicial encroachment on foreign relations matters which are constitutionally the responsibility of the Executive.

1. Respect for Territorial Sovereignty

From its inception, the act of state doctrine has reflected a reluctance by the courts of this country to judge the acts of a foreign sovereign done within his own territory. An early expression of this concept came from the Supreme Court in *Underhill v. Hernandez*,[12] where the Court wrote:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of another done *within its own territory*. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The Court recognized in *Underhill* that a state has the power to prescribe the uses of property within its own territory and consequently refrained from reviewing those acts of a foreign sovereign that concerned only property or persons within such territory.[13]

The *Underhill* opinion reflected a traditional concept fundamental to a world political system composed of nation-states. No nation can assert rights over the territory of another nation without risking war. Those rights reserved to a national sovereign include regulation and disposition of property within the national territory.

Recently, however, courts of many nations have begun to question the validity of absolute deference to the sovereign, particularly when the sovereign's acts, though done within its own territory, affect persons or entities not subjects of the sovereign.[14] Though legal commentators have urged similar broader review in United States courts of foreign acts of state,[15] American courts, as exemplified in *Sabbatino*, have persisted in the policy of non-review and assumed the validity of official acts concerning persons or property within a foreign nation.

Congress, in response to the *Sabbatino* decision, passed the Sabbatino

12. 168 U.S. 250, 252 (1897) (emphasis added).

13. In subsequent decisions, the Court reiterated the suggested inviolability of territory. *See* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918).

14. For a collection of cases, *see* Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 855 n. 6 (2d Cir. 1962).

15. For a collection of both American and foreign authorities, *see* Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 376, 380 n. 7 (S.D.N.Y. 1961).

Amendment[16] in an attempt to require the Judiciary to review those acts of foreign states involving expropriation. The effect of this inroad on the act of state doctrine, however, was confined by the Second Circuit Court of Appeals in *Citibank* to cases involving title to expropriated property, or the proceeds thereof, which has found its way into the United States. The appellate court thus reversed the district court's finding that the amendment permitted review on the merits of Citibank's counterclaim,[17] since the counterclaim did not challenge title to the expropriated property, but only demanded compensation for the expropriation.[18] Perhaps because each of the opinions in the

16. Foreign Assistance Act of 1965, 22 U.S.C. § 2370(e)(2) (1970), *amending* 78 Stat. 1013 (1964).

17. 270 F. Supp. 1004, 1007 (S.D.N.Y. 1967).

18. Certain instructive remarks in this respect are cited by the Court of Appeals. For instance, Senator Hickenlooper, who sponsored the bill, explained that "[o]ne of the principal reasons for the proposed amendment is that it will serve notice that foreign states taking action against U.S. investment in violation of international law cannot market the product of their expropriation in the United States free from litigation." 110 Cong. Rec. 19559 (1964). Professor Cecil Olmstead, one of the authors of the Amendment, was also questioned by Congressman Fraser of the House Committee on Foreign Affairs about a situation remarkably akin to that faced by First National City Bank in the instant case. He was asked:

> For example, supposing that country X expropriates some property and doesn't compensate for it and then a property belonging to the foreign state comes into the hands of an American citizen within the country so that they bring an action, they attach the property and bring an action in the U.S. courts alleging that this government has wronged them by expropriating their property, but the property they have attached is not the property that was expropriated, nevertheless they make the claim they are entitled to compensation and the defense, I assume, by the country involved is that they had a right to expropriate.
>
> Does that situation come within the language of your amendment?
>
> Mr. Olmstead: No sir; that would not come within it. Our amendment has no provision in its scope to apply to property other than that actually expropriated by the foreign country itself.

Hearings before the House Comm. on Foreign Affairs on H.R. 7750, 89th Cong., 1st. Sess. 607 (1965).

It is also interesting to note that the Executive *opposed* the Sabbatino Amendment at the time of its enactment. In a memorandum dated July 28, 1964 it stated that "[m]ost American-owned property expropriated abroad is never brought to the United States and does not come within the jurisdiction of our courts. Most often, land or fixed installations are the object of expropriation. . . . Thus, the "Sabbatino" amendment would not do American claimants very much good." Memorandum of July 28, 1964, to the Senate Foreign Relations Committee.

In an earlier memorandum of June 25, 1964, the Executive specifically attacked the Amendment's "reverse *Bernstein*" approach that would allow the President to invoke the act of state doctrine if the foreign policy interests of the U.S. so require. The memorandum stated:

> (a) The President's choice of whether or not to object is not as a practical matter a real one. If the President were to decide to object in one case and not to object in another, he would only invite charges of discrimination by the country involved in the latter case and would run an unacceptable risk of an adverse effect on U.S. relations with that country. Moreover, failure to object would raise a question of

majority found other grounds for holding the counterclaim reviewable, the Supreme Court in *Citibank* did not consider either the Sabbatino Amendment itself or the circuit court's treatment of it. For the present, therefore, it appears that the Second Circuit's opinion respecting the applicability of the Sabbatino Amendment will be regarded as authoritative.

2. International Commerce Considerations

It has been suggested that another basis for the doctrine is to provide a uniform rule of decision by which men may order their affairs and thereby promote the stability and predictability of transnational transactions.[19] Particularly where standards of international law are uncertain, refusal to review a foreign state's acts avoids the possibility of United States courts rendering inconsistent decisions on the merits of similar questions. Title to possessions would remain more secure for an owner or buyer in international commerce, thereby mitigating concern that items of exchange might be subject to conflicting claims in foreign jurisdictions.

3. Separation of Powers

An important basis for the doctrine in United States law is the constitutional separation of powers. The Executive is charged with conducting foreign relations, and judicial decisions on matters intimately involving foreign affairs could risk embarrassment of the Executive. This theme is central to the *Sabbatino* decision,[20] where Justice Harlan found the "continuing vitality" of the doctrine to depend "on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing

---

U.S. adherence to its nondiscrimination pledges under international agreements, both bilateral and multilateral.

Hearings on S. 2659, S. 2662, & H.R. 11380, Before the Senate Comm. on Foreign Relations, 88th Cong., 2d Sess. 618 (1964), *reprinted in* 3 INT'L LEGAL MATERIALS 1077 (1964). *See generally* LILLICH.

Precisely the same risks of affront to other nations inhere of course in the *Bernstein* exception (*see* notes 24–28, *infra*) relied on by Justice Rehnquist in *Citibank*. Under the *Bernstein* exception, the Executive retains ultimate control over what act of state cases the courts will hear. It would seem unlikely that foreign states would be any less offended by discriminatory executive application of the *Bernstein* exception than by executive discrimination within his Sabbatino Amendment powers.

19. Note, 12 HARV. INT'L L. J. 557, 565 (1971).

20. *See* 376 U.S. at 423, 427–428, 431–433. The Court seemed to think that even a decision in accord with State Department policy might be embarrassing since the "stamp of approval" by the Judiciary would only increase any affront to the foreign sovereign. The deference given the Executive in international relations is mitigated only by one short passage in which the Court implied that, in order not to give the Executive a chance to embarrass itself, courts should not adjudicate a case even when the Executive indicates that such adjudication would be proper. *Id.* at 436.

upon foreign affairs."[21] This separation of powers thus provides the "constitutional underpinnings" for the doctrine.[22] The *Sabbatino* Court declared that judicial examination of a foreign sovereign's acts might be permitted only in those limited situations where a court finds that the possibility of current or future embarrassment to the Executive is very slight: (1) if there were a relatively codified standard of international law for decision, (2) if the implications for foreign relations were of minor importance, or (3) if the government responsible were no longer in existence.[23]

A further exception to the act of state doctrine was developed in the *Bernstein* litigation in the Second Circuit Court of Appeals after World War II.[24] The cases involved an effort at judicial redress for uncompensated expropriations of private property by the Nazi German government. In the first two cases[25] the court held that it could not inquire into the legality of the taking *unless* the Executive removed the act of state bar. Counsel for Mr. Bernstein wrote to the State Department and received in reply a letter which advised him that it was the policy of the Executive that American courts should feel themselves under no restraints in assessing the legal ramifications of official acts of the Nazi government.[26] The State Department view was conveyed to the Court of Appeals, which thereupon reversed *per curiam* its prior decision, holding that the official communication from the Department permitted judicial examination of the Nazi expropriations and that these expropriations violated international law.[27] The *Sabbatino* Court declined to rule on the validity of the *Bernstein*

21. *Id.* at 427–28.
22. *Id.* at 423.
23. *Id.* at 428.
24. Bernstein v. Van Heygen Frères Société Anonyme, 163 F.2d 246 (2d Cir. 1947); Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949); Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschaapij, 210 F.2d 375 (2d Cir. 1954).
25. See Note 24, *supra*.
26. The letter was published at 20 DEPT. OF STATE BULL. 592 (April 27, 1949). One of the principal State Department attorneys involved in the litigation gives an interesting description of the situation in the Department at the time the case came up. *See* Metzger, *Act of State Doctrine and Foreign Relations*, 23 U. PITT. L. REV. 881, 890 n. 30 (1962).
27. Some commentators have suggested that the *Bernstein* exception is merely a subset of the third exception proposed by Justice Harlan in *Sabbatino* (where the particular foreign government is no longer extant). *See, e.g.*, Delson, *The Act of State Doctrine — Judicial Deference or Abstention?*, 66 AM. J. INT'L LAW 82, 90 (1972). Such an interpretation relies on a narrow construction of the *Bernstein* case, limiting it to its rather peculiar facts. This view is felt to be consistent with prior act of state decisions in the Supreme Court, since there would be no danger to the conduct of foreign affairs (exception 2 above) if the particular state were no longer in existence (exception 3 above). However, the distinguishing characteristic of the *Bernstein* exception is actual *instruction* from the Executive to the court. Presumably the Executive under *Bernstein* could ask the courts to consider a case even if none of the criteria listed by Justice Harlan were met.

exception,[28] but each of the Supreme Court opinions in *Citibank* felt compelled to discuss it.

REASONING OF THE COURT

In his three-man plurality opinion, Mr. Justice Rehnquist held the *Bernstein* exception dispositive, grounding his decision on a letter written by the Legal Adviser to the Department of State on November 17, 1970, requesting that the act of state doctrine not be applied "to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."[29] Justice Rehnquist declared "that as a matter of principle where the Executive publicly advises the Court that the act of state doctrine need not be applied, the Court should proceed to examine the legal issues raised by the act of a foreign sovereign within its own territory as it would any other legal question before it."[30] He then went on to identify what seemed to him to be the three main reasons for the doctrine: international comity, deference to the Executive in foreign affairs, and fear of political embarrassment to the Executive. Extending the latter two points, Justice Rehnquist held that if the Executive represents to the Court "that the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts."[31] The letter from the Legal Adviser was the requisite indication of American foreign policy considerations, jurisdictional standards had been met, a decision on the merits was in order, and the case was remanded to the Court of Appeals. The three-justice plurality did not address the question of international comity.

28. "This Court has never had occasion to pass upon the so-called Bernstein exception, nor need it do so now." 376 U.S. at 420. The Court of Appeals had relied on two rather ambiguous letters from the State Department to counsel for *amici*, but the Department filed a brief as *amicus* before the Supreme Court in which it specifically asked that the Court not render a decision on the merits. Respondent Sabbatino did not contest the assertion that the letters were merely intended to show that the Department did not wish to make any statement bearing on the litigation at the time. The relevant text of the letters is quoted in 376 U.S. at 420 n. 19.

29. Stevenson Letter.

30. 92 S.Ct. at 1811. The Legal Adviser informed the Court that "recent events" had convinced the Department of State that the act of state doctrine should not be used to bar adjudication of a counterclaim or set-off if three specific conditions existed: "(a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine." 442 F.2d at 537. The "recent events" referred to were apparently the increase in expropriations of assets of U.S. nationals by foreign governments. Indeed, the Legal Adviser made special reference to the fact that banks seemed particularly vulnerable to expropriation of their foreign property and demands by the states that the banks return any deposits owed them in the United States. *See* National City Bank v. Republic of China, 348 U.S. 356 (1955); note 32, *infra*.

31. 92 S.Ct. at 1813.

Mr. Justice Douglas concurred in the result, but denied that either the *Bernstein* exception or the *Sabbatino* decision was controlling. Instead, he held the result was mandated by the Court's decision in *National City Bank v. Republic of China*.[32] That case involved a claim of sovereign immunity rather than act of state, so Justice Douglas was forced to "start from the premise that the plaintiff in the present litigation . . . is for our purposes the sovereign state of Cuba."[33] *Republic of China* allowed a counterclaim against a sovereign up to the amount in suit, and Justice Douglas found that "fair dealing" similarly called for allowance of Citibank's counterclaim in this case.

Past the point of equitable set-off, Justice Douglas felt that *Sabbatino* was controlling and, for the reasons enunciated there, would disallow any further recovery. In his view, any claim by Citibank that exceeded the value of Banco Nacional's claim would be a non-justiciable "political question" of just compensation. It should be noted that allowance of recovery at all, even though limited to the amount in suit, results in an adjudication that *some* compensation is due. *Sabbatino*, on the other hand, while also concerned with a counterclaim, decided that the issue of compensation *per se* was a political question and suitable only for Executive resolution. Justice Douglas took vigorous issue with Justice Rehnquist's willingness to allow the Executive directly to pass these political questions to the Court by invoking the *Bernstein* exception, emphasizing that the Judiciary must ultimately determine questions of justiciability. As applied by Justice Rehnquist, he concluded, the *Bernstein* exception would reduce the Court to "a mere errand boy for the Executive which may choose to pick some people's chestnuts from the fire, but not others."[34]

Justice Powell, in a separate concurring opinion, also found the *Bernstein* exception inapplicable,[35] suggesting that *Sabbatino*, when read as a whole, cast doubt on its continuing vitality.[36] Like Justice

32. 348 U.S. 356 (1955). The Republic of China brought suit to recover a deposit with defendant bank. The bank counterclaimed for the value of two notes on which the Republic had defaulted, which counterclaims were dismissed by the district court on the ground of sovereign immunity from suit. The Supreme Court reversed, holding that when a sovereign voluntarily entered a U.S. court it opened itself to counterclaims reducing the recoverable amount, even if not based on the same subject matter as the sovereign's suit. The decision not to pay on the notes, although technically an act of state, did not come under the protection of that doctrine since the sovereign itself was a party to the suit, rather than a private person affected by the sovereign's acts.

33. 92 S.Ct. at 1814.

34. *Id.* at 1816.

35. *Id.* at 1816.

36. Counsel for Mr. Sabbatino suggested that the courts should apply the act of state doctrine only when asked to do so by the Executive. The government in its brief as *amicus* rejected this idea as an inconvenience and possible embarrassment to the Executive. The Court agreed and concluded by saying, "[w]e do not now pass on the

Douglas, Justice Powell expressed discomfort with a doctrine which depended so heavily on the will of the Executive. But Justice Powell did not find *Republic of China* controlling, since that case dealt with a defense of sovereign immunity to a counterclaim based on a commercial transaction (issuing notes) undertaken by the Chinese government. In the present action jurisdiction over Banco Nacional had not been contested;[37] the challenge went instead to the propriety of a counterclaim that arose from the official acts of a foreign state. The problem, he said, was one of justiciability of a particular class of claims; simple jurisdiction over both parties did not imply that every question they raised would be "meet for adjudication."[38] Since Justice Powell felt *Republic of China* was not precedent for this case, he could find little support for allowing a claim only up to the point of set-off.

Justice Powell based his concurrence instead on a belief that the holding in *Sabbatino* was too broad and not compelled by the principles behind the act of state doctrine, even as enunciated by the *Sabbatino* Court. Conceding that the Judiciary should be obliged to defer to Executive wishes when delicate foreign relations might be affected, he insisted that the prevention of Executive embarrassment did not require the courts to refrain from action in all cases involving foreign expropriations. The doctrine of separation of powers did not demand that the Court abdicate its "responsibility to persons who seek to resolve their grievances by the judicial process."[39] Instead, Justice Powell considered that the courts of various countries provided a vehicle for the development of international law, separate from but

Bernstein exception, but *even if it were deemed valid*, its suggested extension is unwarranted." 376 U.S. at 436 (emphasis added).

37. Banco Nacional did plead sovereign immunity in the district court, but abandoned this argument by the time the case reached the Supreme Court, preferring instead to plead autonomy from the Government of Cuba and lack of responsibility for Cuba's debts. Brief for Respondent in the Supreme Court, at 6–7. Therefore jurisdiction was conferred both by Banco Nacional's voluntary resort to U.S. courts and by an alleged private rather than governmental status.

38. The classic case of Marbury v. Madison, 1 Cranch 137 (1803), established that all legal issues were to be adjudicated by the Court, and that the validity of a governmental act was a legal issue. But the Court's power to dispose of a legal issue based on international law is, according to one authority, not so easily derived from *Marbury*. Professor Abram Chayes, former Legal Adviser to the State Department, observes that the power of U.S. courts to review acts of the other branches is a unique tradition, not often found in other countries. Therefore, to define the role of U.S. courts in international law by analogy to the judicial role in this country is perhaps false. *See* FALK 86.

In light of the above, Justice Powell's distinction between jurisdiction and justiciability should be clearer. Should a legal issue arise, even if that act is alleged to violate international law, the Court may find that it cannot resolve the legality of such an act because it is without the range of justiciable legal issues to which our courts should address themselves. Justice Powell, however, went on to find that certain foreign acts of state *were* within the power of U.S. courts and the courts consequently were obliged to render decisions on the merits in those cases.

39. 92 S.Ct. at 1817.

still related to the "law" formulated by the political branches of the government. He went on to conclude "that federal courts have an *obligation* to hear cases such as this"[40] unless adjudication could be shown sharply to conflict with the Executive Branch.

Mr. Justice Brennan, joined by Justices Stewart, Marshall and Blackmun, filed a dissenting opinion strongly critical of Justice Rehnquist's reliance on the *Bernstein* exception. Indeed, Justice Brennan considered the greatest anomaly of the decision to be the fact that the case is remanded to the Court of Appeals on the basis of the exception, although six Justices repudiated *Bernstein* (the dissenters, plus Powell and Douglas) and only three supported it.

Justice Brennan agreed with Justice Douglas that under certain circumstances an act of a foreign state produced "political questions," with the attendant delicacies and difficulties associated with that term. Furthermore, he argued, permission from the Executive to examine a question of this nature should hardly be the chief consideration in a decision to extend judicial review.[41] The refusal to review a certain type of question derives from a judicial doctrine of self-limitation, and consequently the courts must determine when and if exceptions to the doctrine are warranted.

The dissenters rejected Justice Rehnquist's view that fear of interference with Executive conduct of foreign affairs was to be construed as the principal rationale for the act of state doctrine. On the contrary, a number of different considerations combined to highlight the futility of any attempt at judicial resolution of the present case, including:

> the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed. . . .[42]

Justice Brennan pointed out that a close adherence to the *Bernstein* exception as developed in Justice Rehnquist's opinion would force the courts into a "blind adherence" to Executive policy, unnecessarily politicizing the Judiciary and undermining respect for international law. The exception encourages the Judiciary to advocate standards

40. *Id.* (emphasis added).

41. Justice Brennan refers to his decision in Baker v. Carr, 369 U.S. 186, 211 (1962) as authority for the belief that Supreme Court decisions in the area of foreign relations "seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches . . . and of the possible consequences of judicial action." 92 S.Ct. at 1823 n. 11. If Justice Brennan felt the "history of political management" of the Cuban cases to be less than spectacular, it is understandable that he would be reluctant to involve the Court.

42. 92 S.Ct. at 1823.

of conduct in international relations in areas where there are as yet no firm principles, thereby usurping a task assigned to the Executive. Interpretation of the law is a function of both Court and Executive; advocacy of the law is a responsibility of the political branches.[43]

The dissent went on to reject *Republic of China* as controlling. Concurring with Justice Powell's criticisms of that case as precedent, the dissenters further noted that the considerations of fair play advocated by Justice Douglas did not all operate in favor of Citibank. Since Cuba itself was not a party to the action, and Banco Nacional had disclaimed responsibility for debts or acts of the Cuban state,[44] Justice Brennan was unwilling to concede that Banco Nacional had waived the traditional protection of the act of state doctrine in any manner logically analogous to China's implied waiver of sovereign immunity when it entered United States courts.[45]

RAMIFICATIONS OF THE DECISION

The three opinions which formed a majority of the Court, and which agreed only that the act of state doctrine does not preclude the Court of Appeals from examining the merits of Citibank's counterclaim, have left the doctrine in a state of confusion. Justices Rehnquist and Powell seem diametrically opposed in their views: the former would leave the Judiciary at the Executive's bidding in act of state cases, while the latter would evidently have the Judiciary decide such cases unless the court was persuaded of possible embarrassment to the Executive. Justice Powell thus agrees with the dissenters that the courts must determine issues of justiciability, but would include a broader scope of act of state cases within the bounds of justiciability. Justice Douglas also agrees that the Executive cannot determine justiciability, but he has in addition put himself in the unenviable position of allowing the existence of a political question to depend on the dollar amount of a defendant's counterclaim. Unless Justice Douglas views the difficulty in enforcing a judgment in excess of a sovereign's claim as the sole basis for terming a case a political question, it is difficult to see the issues involved in Citibank's counterclaim up to the amount of set-off as any more justiciable than those past that sum. Curiously, while Douglas found that "fair dealing" dictated allowance of Citibank's counterclaim, the unusual circumstances of the case are such

43. *Id.* at 1824–25.

44. Because Douglas found Cuba to be the real party in interest, the fact that it was not actually denominated as a party was unimportant to him.

45. *See* note 37, *supra*. In *Republic of China* it was felt that a sovereign suing in U.S. courts "wants our law" and should therefore be willing to accept all of our law, rather than only those portions most favorable to it. "Our law" of course includes a long reliance on the act of state doctrine.

that it might be more equitable if Citibank is not allowed to keep the excess collateral. Any judgment for Banco Nacional would automatically become a blocked Cuban asset[46] and, if all attempts at settlement fail, vest in the United States government for equitable distribution among all those who claim to have been injured by the expropriation of property in Cuba.[47]

Professor Zander's comment on the *Bernstein* litigation seems equally appropriate to *Citibank*: "[o]ne of the most questionable features of this case is the degree of deference with which the courts in the United States treat the Executive Branch."[48] If carried to its limits, the *Bernstein* exception negates the very concept of separation of powers which serves as its rationale.[49] In the instant case, for example, the State Department felt that only counterclaims "limited to the amount of the foreign state's claim"[50] should be free from the act of state restraint, but this criterion will not necessarily be employed by the Executive in all future cases of a like nature. But *Bernstein* as expounded by Justice Rehnquist could oblige the Court to allow larger counterclaims if the Executive so requested, for he implies that the courts never resort to the act of state doctrine if advised not to by the State Department.[51] If the Executive obtains unbridled discretion to decide when a question involving foreign relations is within the competence of the Judiciary, judicial independence is unavoidably compromised.

46. 31 C.F.R. §§ 515 *et seq.* (1970), promulgated under the Trading With the Enemy Act of 1917, 50 U.S.C.A. § 5 (1970 Supp.). This statute does not at present provide for the vesting of blocked Cuban assets — public or private — in the United States government for distribution to those who have submitted claims, based on expropriations, to the Foreign Claims Settlement Commission. The State Department in 1965 felt that vesting of those assets in the U.S. government would "place the Government of the United States in the position of doing what Castro has done" and "cause other governments to question the sincerity of the U.S. Government in insisting upon respect for property rights." Sen. Rep. No. 701, 89th Cong., 1st Sess., 2 U.S.C. Cong. & Admin. News 3583 (1965). For a more complete text of the Senate Foreign Relations Committee report, *see* Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 403 n. 16 (3d Cir. 1970).

47. It seems possible that the Executive has already begun to despair of other attempts at settlement. The State Department stated in its letter to the Court in this case that the decision in the Court of Appeals, denying relief, "seriously . . . restricts the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad." Memorandum for the United States as Amicus Curiae, at 2. The implication is that U.S. efforts to secure redress for American investors abroad (or at least in Cuba) may have swung in the direction of appropriating any assets that fall within reach, rather than negotiating a settlement with the Castro government. The Executive policy contained in the above memorandum should be compared to the policy evident in the passage cited in note 46, *supra*, from the Senate Foreign Relations Committee Memorandum for June 25, 1964.

48. Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826, 833 (1959).

49. The Court in *Sabbatino* listed several adverse consequences to judicial participation in foreign affairs:

1. Insult to the expropriating nation, if the act were held to violate international law;

Justice Powell suggests a role of greater judicial activism. His opinion places the weight of decision on the courts, suggesting that "the basic notion of the act of state doctrine . . . requires a balancing of the roles of the judiciary and the political branches."[52] This approach would maintain judicial independence, and at the same time would not demand that the courts avoid resolution of all disputes involving "an act of state." But it would require American courts to develop a degree of competence in the field of foreign affairs, a task they traditionally have eschewed. It would also require an express assessment and verbalization of the role of the Judiciary vis-à-vis the Executive in foreign relations, and in this regard Justice Powell's obscure reference to "balancing of the roles" is regrettably of little help.[53] Though all of the opinions in *Citibank* speak of a desire to avoid abdication of judicial responsibility to the Executive, both the *Bernstein* exception and the reasoning of the dissent ultimately act to relieve the courts of any meaningful role in this area of international law. In this sense, Justice Powell has perhaps provided the most responsible option of the four suggested.

The difficulties facing the circuit court on remand are formidable. Since the counterclaim is actually against the Republic of Cuba, the

2. Embarrassment to the Executive if the Court decided the expropriation did not violate international law when the Executive had been asserting the contrary;

3. Embarrassment of the Executive through judicial uncertainty, either because the international law was unclear, or because the Executive had suggested a decision on the merits and then been surprised at the result (the latter is of course a distinct possibility in this case);

4. Weakening of the certainty of titles in international commerce.

But, if the expropriating nation had indeed violated international law, a statement to that effect by the Court should be neither an insult (since such an allegation by the Executive would already have been made) nor would it be unjust. And if the act had not been against international law, the Executive's claim has no legal basis and is in any event untenable. In addition, Citibank makes no claim to the property in Cuba itself, only to compensation, and no titles in international trade will be affected.

This leaves only the third objection, regarding the uncertainty of international law and Executive direction. As to the latter, it hardly seems the Court should feel obliged to protect the Executive from its own blunders, and a specific directive to proceed implies that no possible decision by the Court could embarrass foreign relations. (The validity of this inference in the present case is debatable. In his letter to the Supreme Court for this case, the Legal Adviser clearly assumed the Court would decide in favor of Citibank. Letter, *supra* note 8.) The remaining objection involves the lack of consensus as to the relevant principles of international law, which is the most serious obstacle of the four. Ascertainment of the state of international law on expropriations is left to the Court of Appeals. It is noteworthy that the *Sabbatino* Court could discern no agreement on this principle.

50. Stevenson Letter.

51. 92 S.Ct. at 1811, 1813. Justice Rehnquist also refers to the *Bernstein* exception as a "matter of principle." *Id.* at 1811.

52. *Id.* at 1817.

53. Some progress in the direction of the requisite assessment has been made by various commentators. *See, e.g.*, LILLICH; FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

court must initially determine whether Banco Nacional is an instrumentality of the Cuban State, answerable for the debts of the State. If so answerable, the court will have to decide if a right to compensation *per se* (as opposed to "adequate" compensation) is a tenet of international law, a point on which the *Sabbatino* Court declined to rule. Furthermore, once decision is rendered on these points, the principles enunciated cannot equitably be confined to cases involving only Cuban expropriations. For example, it would be difficult to explain to one seeking redress in American courts for a Chilean expropriation that issues decided in *Citibank* had suddenly become non-justiciable because a different country was involved. Yet unless the Executive suggests adjudication, there is no guarantee the Court will lift the act-of-state bar.

The Executive Branch, constitutionally empowered to direct United States foreign relations, is in Justice Rehnquist's opinion now given the discretion to use the Judiciary as another instrument of foreign policy. While *Sabbatino* removed an entire class of difficult questions from the competence of the courts in an effort to define the distribution of governmental functions, the new *Bernstein* exception entrusts the scope of judicial review of those same questions to the vagaries inherent in executive policy under different administrations.[54] To revise our governmental structure in favor of the relative monopoly of a single branch in such a broad area of societal interaction seems an unnecessary measure, and the *Bernstein* exception as enunciated by the *Citibank* Court represents an unwarranted extension of Executive influence.

David C. Hollrah

54. The unhappy consequences of heavy reliance on the Executive for determination of justiciability are illustrated by an English case, Luther v. Sagor [1921] 1 K.B. 456, relied on by Justice Rehnquist. In that case, the English court had to consider the validity of acts of the Soviet government before it was recognized by the British government. The court felt bound to apply the act of state doctrine, but only if the Soviets were the *real* government of Russia. The proper source of information in such a matter was the Foreign Office, and the judge resolutely announced that he intended "to deal with the case upon the information furnished by His Majesty's Secretary of State for Foreign Affairs." *Id.* at 473. His Majesty's Secretary was to have the last word, not subject to rebuttal, the judge decided. The Soviets were not recognized as the *real* government at the time, and the judge consequently deemed them not entitled to the benefit of the act of state doctrine.

On appeal several months later, [1921] 3 K.B. 532, the court again turned to the Foreign Office for guidance, but by this time Whitehall had recognized the Soviet government. Since the court found that recognition operated retroactively, and the Soviets had been the rightful government all along, the act of state doctrine prevented questioning official acts and the previous decision was reversed. As one writer has observed, "[t]he British courts must have felt somewhat foolish playing 'follow the leader' down the tortuous streets and byways of national policy with the Foreign Office." Franck, *International Law — Through National or International Courts?*, 8 VILL. L. REV. 139, 142 (1962).